

1 BILL NO. S-88-02- 24

2 SPECIAL ORDINANCE NO. S- 57-88

3
4 AN ORDINANCE approving Change
5 Order No. 1 (FINAL) for Res.
6 440-86, Fairfield Avenue
7 Sanitary Sewer with JOHN
8 DEHNER, INC. in connection with
9 the Board of Public Works
10 and Safety of the City of
11 Fort Wayne, Indiana.

12 NOW, THEREFORE BE IT ORDAINED BY THE COMMON COUNCIL
13 OF THE CITY OF FORT WAYNE, INDIANA:

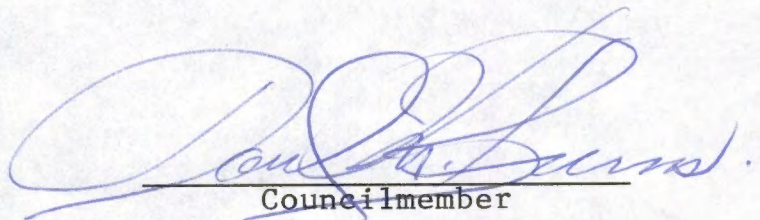
14 SECTION. 1. That Change Order No. 1 (FINAL)
15 for Res. 440-86, Fairfield Avenue Sanitary Sewer, with
16 John Dehner, Inc., in connection with the Board of Public
17 Works and Safety, for:

18 this Change Order is necessary
19 because of the followig:
20 Although this item is represented
21 to be a decrease in the unit
22 bid item it actually is an
23 increase in the final cost
24 extension. This is necessary
25 due to the fact that the
26 original bid submitted by
27 John Dehner, Inc. did not
28 have the correct extension
29 on this item, and was awarded
30 using an erroneous number.
31 This change adjusts the item
32 to the correct extension
originally extended on the
bid. The amounts and quantities
outlined in items 26, 27
and 28 represent the majority
of change required under
this contract. During the
course of construction of
this project it was determined
that the existing riverbed
elevation was different from
that shown on the design
plan supplied by Bonar &
Associates Inc., who were
contracted by separate agreement
for this design. Upon finding
this discrepancy all work
was halted for a period of
two (2) days to allow for
additional engineering review.
The existing riverbed elevation
was determined to be approximately
5½ feet lower than design
plans. As the prime contractor
had already reached the riverbank
and was beginning construction
of the earthen cofferdam
required for the siphon installation,
an immediate decision had
to be made to eliminate any

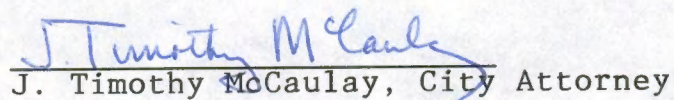
1 costly delays. The most
2 efficient and expedient method
3 for construction was determined
4 to be to continue on and
5 install the river crossing
6 siphon at the same location.
7 This entailed installing
8 the siphon 5½ feet deeper.
9 Item #26 is reflective of
10 the actual downtime incurred
11 by the contractor due to
12 the discrepancy in the design
13 plans. Items #27 and #28
14 are reflective of the negotiated
15 amounts with the contractor
16 for the additional work performed
17 to successfully complete
18 the siphon installation.
19 John Dehner, Inc. is the
20 contractor;

21 involving a net increase of One Hundred One Thousand,
22 One Hundred Seventy-Four and 10/100 Dollars (\$101,174.10),
23 all as more particularly set forth in the specifications,
24 and which is on file with the Office of the Board of Public
25 Works and Safety and is by reference incorporated herein,
26 made a part hereof, and is hereby in all things ratified,
27 confirmed and approved.

28 SECTION 2. That this Ordinance shall be in full
29 force and effect from and after its passage and any and
30 all necessary approval by the Mayor.

31 
32 Councilmember

APPROVED AS TO FORM
AND LEGALITY

33 
34 J. Timothy McCaulay, City Attorney

77-229-14
2/10/88

CHANGE ORDER

Change Order No. #1 (Final)
 Project No. _____
 Name of Project: Fairfield Avenue Sanitary Sewer
 To: John Dehner, Inc.
 (Contractor)

Resolution No. 440-86
 Board Order No. 29-87
 Date: 14 January 1988

Gentlemen:

You are hereby requested to comply with the following changes from the contract plans and specifications:

Item No.	Quantity	Description of Change Description	Unit Price	Change in Contract Price	
				Decrease	Increase
		(SEE ATTACHED)			
Total Decrease				5,430.40	
Total Increase					106,604.50
Net (Decrease) (Increase)					101,174.10
Contract Price					

The sum of \$ 101,174.10 is hereby (added to) (~~deducted from~~) the total contract price and the final contract price shall be adjusted as follows:

Original Contract Price	\$	<u>167,084.90</u>
Current Contract Price Adjusted by Previous Change Order	\$	<u>167,084.90</u>
New Contract Price including this Change Order	\$	<u>268,259.00</u>

The time provided for completion in the contract for this project is (unchanged) (~~increased~~) by -0- calendar days due to this Change Order. The date for completion of all work shall be same. Furthermore, this document shall become an amendment to the contract and all provisions of the contract shall apply hereto.

Recommended by: Scuy Clebert Chief Engineer Date 1/19/88
 Accepted by: Gregory DeGuer Contractor Date 1/19/88
 Approved by: Gregory DeGuer City Engineer Date 1-19-88
 Approved by: Angela Deheimer Owner Date 2-10-88
Robert De
 Attested by: Blenn W. Gashenau Clerk Date 2-10-88

ATTACHMENT TO CHANGE ORDER

Item	Quantity		Description of Change	Unit Price	Change in Contract Price	
					Decrease	Increase
1	38	C.Y.	Special Backfill #53-#73	11.89		1,688.38
2	212	C.Y.	Special Backfill	8.65	1,833.80	
3	16	S.Y.	9" Plain Concrete Pavement	31.50		504.00
4	10	Ton	Bituminous Base No. 5	86.25	862.50	
5	3	Ton	Bituminous Surface	115.00	345.00	
6	17.5	C.Y.	Class "B" Concrete for			
			Encasement	105.60	1,848.00	
11	29	L.F.	30" Ductile Iron Pipe			
			Class 51	175.00		5,075.00
14	7	L.F.	36" R.C.P. Class III	77.30	541.10	
26	1	L.S.	Construction Downtime	3,518.72		3,518.72
27	1,040	C.Y.	Additional Material for			
			Earthen Cofferdam	9.97		10,368.80
28	11,040	S.F.	Sheeting	7.74		85,449.60
Total Decrease					5,430.40	
Total Increase						106,604.50
Net (Decrease) (Increase)						101,174.10

Change Order No. #1(Final)

Resolution No. 440-86

Board Order No. 29-87

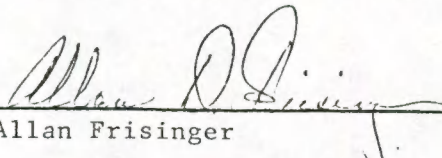
REQUEST AND JUSTIFICATION FOR CHANGE

1. Necessity for change: Item #1 - Although this item is represented to be a decrease in the unit bid item it actually is an increase in the final cost extension. This is necessary due to the fact that the original bid submitted by John Dehner Inc. did not have the correct extension on this item, and was awarded using an erroneous number. This change adjusts the item to the correct extension originally intended on the bid. The amounts and quantities outlined in items 26, 27, and 28 represent the majority of change required under this contract. During the course of construction of this project it was determined that the existing riverbed elevation was different from that shown on the design plans supplied by Bonar & Associates Inc., who were contracted by separate agreement for this design. Upon finding this discrepancy all work was halted for a period of two (2) days to allow for additional engineering review. The existing riverbed elevation was determined to be approximately 5½ feet lower than design plans. As the prime contractor had already reached the riverbank and was beginning construction of the earthen cofferdam required for the siphon installation, an immediate decision had to be made to eliminate any costly delays. The most efficient and expedient method for construction was determined to be to continue on and install the river crossing siphon at the same location. This entailed installing the siphon 5½ feet deeper. Item #26 is reflective of the actual downtime incurred by the contractor due to the discrepancy in the design plans. Items #27 and #28 are reflective of the negotiated amounts with the contractor for the additional work performed to successfully complete the siphon installation.

2. Will proposed change alter size of the project? Yes _____ No X
If yes, explain

3. Affect on operation and maintenance cost of this project:

No


Allan Frisinger Project Engineer

Read the first time in full and on motion by Burns, seconded by Starr, and duly adopted, read the second time by title and referred to the Committee on City of Utilities (and the City Plan Commission for recommendation) and Public Hearing to be held after due legal notice, at the Council Conference Room 128, City-County Building, Fort Wayne, Indiana, on _____, 19____, at _____ o'clock _____ M., E.S.T.

DATED: 2-23-88

Sandra E. Kennedy
SANDRA E. KENNEDY, CITY CLERK

Read the third time in full and on motion by Burns, seconded by Starr, and duly adopted, placed on its passage. PASSED ~~LOST~~ by the following vote:

	AYES	NAYS	ABSTAINED	ABSENT
TOTAL VOTES	<u>8</u>	<u>1</u>		
BRADBURY	<u>✓</u>			
BURNS	<u>✓</u>			
GiaQUINTA	<u>✓</u>			
HENRY	<u>✓</u>			
LONG	<u>✓</u>			
REDD	<u>✓</u>			
SCHMIDT		<u>✓</u>		
STIER	<u>✓</u>			
TALARICO	<u>✓</u>			

DATED: 4-12-88

Sandra E. Kennedy
SANDRA E. KENNEDY, CITY CLERK

Passed and adopted by the Common Council of the City of Fort Wayne, Indiana, as (ANNEXATION) (APPROPRIATION) (GENERAL)

(SPECIAL) (ZONING MAP) ORDINANCE RESOLUTION NO. 1-57-88

on the 12th day of April, 1988,

Sandra E. Kennedy ATTEST
SANDRA E. KENNEDY, CITY CLERK

SEAL
Thomas P. Henry
PRESIDING OFFICER

Presented by me to the Mayor of the City of Fort Wayne, Indiana, on the 13th day of April, 1988, at the hour of 11:00 o'clock A. M., E.S.T.

Sandra E. Kennedy
SANDRA E. KENNEDY, CITY CLERK

Approved and signed by me this 22nd day of April, 1988, at the hour of 4:00 o'clock P. M., E.S.T.

Paul Helmke
PAUL HELMKE, MAYOR

TITLE OF ORDINANCE Final Change Order #1, Res. 440-86, Fairfield AvenueDEPARTMENT REQUESTING ORDINANCE Sanitary Sewer
Board of Public Works & SafetySYNOPSIS OF ORDINANCE- Final Change Order #1, Res. 440-86, Fairfield Ave.

Sanitary Sewer, is necessary because of the following. Item #1 - Although this item is represented to be a decrease in the unit bid item it actually is an increase in the final cost extension. This is necessary due to the fact that the original bid submitted by John Dehner, Inc. did not have the correct extension on this item, and was awarded using an erroneous number. This change adjusts the item to the correct extension originally extended on the bid. The amounts and quantities outlined in items 26, 27 and 28 represent the majority of change required under this contract. During the course of construction of this project it was determined that the existing riverbed elevation was different from that shown on the design plans supplied by Bonar & Associates Inc., who were contracted by separate agreement for this design. Upon finding this discrepancy all work was halted for a period of two (2) days to allow for additional engineering review. The existing riverbed elevation was determined to be approximately 5½ feet lower than design plans. As the prime contractor had already reached the riverbank and was beginning construction of the earthen cofferdam required for the siphon installation, an immediate decision had to be made to eliminate any costly delays. The most efficient and expedient method for construction was determined to be to continue on and install the river crossing siphon at the same location. This entailed installing the siphon 5½ feet deeper. Item #26 is reflective of the actual downtime incurred by the contractor due to the discrepancy in the design plans. Items #27 and #28 are reflective of the negotiated amounts with the contractor for the additional work performed to successfully complete the siphon installation. John Dehner, Inc. is the contractor.

EFFECT OF PASSAGE To facilitate completion of project.

EFFECT OF NON-PASSAGE _____

MONEY INVOLVED (DIRECT COSTS, EXPENDITURE, SAVINGS) Increase of \$101,174.10

ASSIGNED TO COMMITTEE _____

7-1-88
BILL NO. S-88-02-24

*Held
held 8 weeks*
REPORT OF THE COMMITTEE ON CITY UTILITIES

WE, YOUR COMMITTEE ON CITY UTILITIES TO WHOM WAS
REFERRED AN (ORDINANCE) ^{XXXXXXXXXX} (RESOLUTION) approving Change Order
No. 1 (FINAL) for Res. 440-86, Fairfield Avenue Sanitary
Sewer with JOHN DEHNER, INC. in connection with the Board
of Public Works and Safety of the City of Fort Wayne, Indiana

HAVE HAD SAID (ORDINANCE) (~~RESOLUTION~~) UNDER CONSIDERATION
AND BEG LEAVE TO REPORT BACK TO THE COMMON COUNCIL THAT SAID
(ORDINANCE) (~~RESOLUTION~~)

YES

NO

Paul M. Burns

PAUL M. BURNS
CHAIRMAN

Charles B. Redd

CHARLES B. REDD
VICE CHAIRMAN

Mark E. GiaQuinta

MARK E. GIAQUINTA

Samuel J. Talarico

SAMUEL J. TALARICO

James S. Stier

JAMES S. STIER

CONCURRED IN 4-12-88

Sandra E. Kennedy
City Clerk

AGREEMENT

THIS AGREEMENT, entered into this 5th day of December, 1987, by and between the City of Fort Wayne, Indiana, acting by and through its Board of Public Works & Safety, hereinafter referred to as Owner; and Bonar & Associates, Inc., consulting engineers, 616 South Harrison Street, Fort Wayne, IN 46802, hereinafter referred to as Engineer.

WHEREAS, Owner and Engineer entered into an agreement dated October 22, 1986, whereby Engineer provided consulting engineering services for the design of several projects including the Fairfield Avenue Sanitary Sewer, including a river crossing which is commonly referred to as Project 440-86, hereinafter referred to as "Project", and

WHEREAS, Engineer did perform preliminary and final engineering design on said Project, and

WHEREAS, Owner has caused bids to be received, contracts to be awarded and construction completed for said Project, and

WHEREAS, John Dehner, Inc. was the successful bidder and contractor for the Project, and

WHEREAS, during construction of the Project, the Contractor found that the river bottom elevation was somewhat different than that shown on the contract drawings, and

WHEREAS, because of this difference, the Contractor has requested a change order to cover his additional cost, and

WHEREAS, Owner has placed Engineer on notice of this problem and requested Engineer's assistance in determining the facts, and

WHEREAS, Owner has advised Engineer of their potential responsibility in this situation, and

WHEREAS, it is the purpose of this agreement to resolve this situation.

NOW, THEREFORE, IT IS MUTUALLY AGREED by the parties hereto as follows:

1. Engineer does not acknowledge or accept responsibility for any increased costs by the Contractor as a result of this problem. Each party agrees that they shall defer the establishment of responsibility until all the facts and information have been obtained by all concerned.
2. Each party agrees that, should Engineer be held liable or found responsible in any way for a portion of this cost, then that liability in all cases shall be limited to a maximum of the incremental increase to Owner for the Project that occurred over and above what the Owner would have paid, had the drawings shown exactly what conditions existed at the time of the Project bidding. It is acknowledged by both parties that if the exact conditions found had been shown, the bid amount would have been higher. It is mutually agreed that, should Engineer be liable, it shall not be greater than the increment or differential between the initial bid and what would have been bid, had the exact conditions been shown on the bid documents.
3. It is mutually agreed that the basis for determination of this incremental cost or additional cost will be based upon information supplied and obtained from the Contractor of the Project, John Dehner, Inc. and shall be the difference, if any, between the actual cost by the Contractor and the amount that would have been bid by the Contractor, as reasonably determined by mutual agreement between the Engineer and City, had the contract drawings shown the actual river bottom elevation.

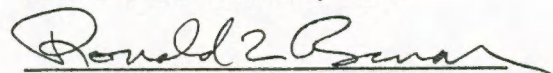
By way of illustration, assume the Contractor would have bid \$490,000 in lieu of the original bid of \$400,000. By way of change order, the Contractor has invoiced the City for a total of \$500,000. The Engineer's liability in this case would be \$10,000 which is the differential between \$500,000 (actual cost) and \$490,000 (would have bid).

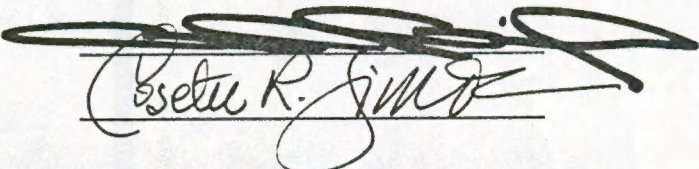
4. Owner agrees upon the determination of this incremental difference described herein that Engineer will have fulfilled any and all obligations as required under said Agreement dated October 22, 1986. Further, Engineer will be released and discharged from any and all claims, demands, claims of damages, costs or losses which Owner now has or which may occur in the future resulting from any act or omission of the Engineer in performing or failing to perform said Agreement dated

IN WITNESS WHEREOF, the parties hereto set their hands the day and year first written above.

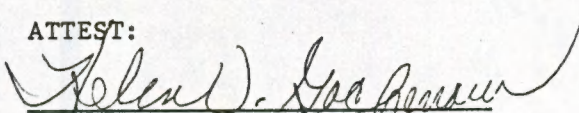
OWNER
CITY OF FORT WAYNE, IN

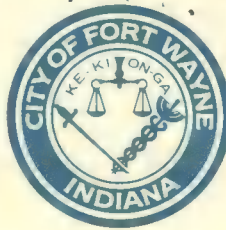
ENGINEER
BONAR & ASSOCIATES, INC.


Ronald L. Bonar, Pres.


BOARD OF PUBLIC WORKS & SAFETY

ATTEST:





THE CITY OF FORT WAYNE

DATE: APRIL 7, 1988

TO: SANDRA KENNEDY, CITY CLERK
TOM HENRY, PRESIDENT, FORT WAYNE CITY COUNCIL
PAUL MIKE BURNS, CHAIRMAN, PUBLIC WORKS COMMITTEE

FROM: ANGELA DERHEIMER, DIRECTOR, BOARD OF PUBLIC WORKS

RE: CHANGE ORDER #1, FAIRFIELD AVENUE SANITARY SEWER
RESOLUTION NO. 440-86

*Desiregard / ne
reached an
agreement
between
both parties*

The Board of Public Works met in regular session this morning and discussed Fairfield Sanitary Sewer Change Order, among other items, on the agenda.

Our counsel, Associate City Attorney David Boyer, has been in negotiations with Dehner, Inc. and Bonar & Associates to resolve a settlement. We are encouraged by the dialogue occurring, but must request that the change order be withdrawn because of the precarious state of negotiations. Our request for your approval was perhaps premature and we feel this action (withdrawal of the ordinance) will assist us in coming to a better resolution in favor of the City. The Board acted in favor of this action this morning.

If you have any questions, please feel free to call me.

Attached, for your information, is the report you requested from Bonar Associates.

Attachment

cc - Don Schmidt
Jimmy Stier
Charles Redd
David Long
Mark GiaQuinta
Janet Bradbury
Sam Talarico

LOWE GRAY STEELE & HOFFMAN

ATTORNEYS AT LAW

ONE INDIANA SQUARE
SUITE 3130

INDIANAPOLIS, INDIANA 46204

317-635-8020

TELECOPIER 317-236-6472

March 21, 1988

L. ROBERT LOWE, JR.
MAXWELL GRAY
SYDNEY L. STEELE
ROBERT J. HOFFMAN
S. DOUGLAS TROLSON
RICHARD J. DARKO
JON F. SPADORCIA
MICHAEL F. DREWRY
STEVEN C. ROBINSON
DAVID L. SIMMONS
CONSTANCE J. GOODWIN

OF COUNSEL
ROBERT R. GIRK
LESLIE E. HOWELL

WILLIAM J. HANCOCK
ROBERT J. MILFORD
MICHAEL L. EINTERZ
RICHARD S. PITTS
SUSAN P. STUART
SCOTT A. WEATHERS
DONALD M. MEYER

LOUIS R. LOWE
1906-1968

HAND DELIVERED

Mr. R. David Boyer
Associate Attorney
City of Fort Wayne
c/o City of Fort Wayne
Department of Public Works and Safety
Fort Wayne, IN 46802

Re: Fairfield Avenue Sanitary Sewer Project;
Resolution 440-86
Our Client: Bonar & Associates, Inc.

Dear Mr. Boyer:

As you know, this law firm represents Bonar & Associates, Inc., the design engineer for the above-referenced project undertaken by the City of Fort Wayne Board of Public Works and Safety. Also representing Bonar is Mr. Gary Dankert of Ice, Miller, Donadio & Ryan. Both Gary and I have consulted with Bonar concerning the statements contained within your letter to Bonar dated March 2, 1988, which gave notice of an intended claim by the City of Fort Wayne against Bonar associated with alleged "erroneous specification in the plans" provided by Bonar for the project. I will attempt to summarize some of the more notable issues which relate to the City's claim against Bonar, with the understanding that this letter should not be construed to limit other issues and defenses which may become relevant to this matter. Furthermore, the comments herein are presented as a means of promoting productive discussions which hopefully will lead to an amicable resolution of the controversy which has surfaced.

The City's intention to make a claim against Bonar appears to rest upon three basic assumptions:

- (1) That Bonar was obligated to furnish plans which exactly depicted a surveyed contour and elevation of the river bottom at the point of crossing;

- (2) That a discrepancy between the depth of the river as shown on the plans and as actually encountered constituted a subsurface condition which obligated the City to pay additional compensation to the Contractor (Dehner), and
- (3) That the pending Change Order represents an accurate and verifiable computation of such additional compensation to be paid.

After a careful and critical review of documentation associated with this matter, including the Change Order documentation and "backup" recently made available to Bonar, each of these assumptions appear to be unsupported.

1. Contractual Scope of Bonar's Services

The drawings prepared by Bonar could depict exact elevation or contour of the river bottom only if engineering design services included a detailed hydrographic survey of the crossing route. The engineering agreement between Bonar and the City (NSPE Form 1910-1) states quite conclusively that Bonar's design services did not include probings, subsurface explorations or "hydrographic surveys", and that the performance of such surveys and other "subsurface explorations" was a duty to be performed by the Owner (see Attachment "A").

A hydrographic survey was plainly not within the scope of Bonar's contracted Basic Services. Obviously then, the drawings for the project were never intended as a positive, unequivocal representation by Bonar to the Owner (or by the Owner to the Contractor) that the subsurface river bottom contour and elevation was exactly as depicted. The controlling information on the plans was not the river bottom elevation/contour; it was the requirement that the siphon pipe be placed with 3 foot "minimum cover", regardless of the elevation at which the pipe had to be placed. In this regard, it is important to note that the plans were prepared in the context of this project being a "unit price" as opposed to a "lump sum" contract. As a unit price contract, it was foreseen and, indeed anticipated, that actual quantities and conditions would be different than those shown or estimated on the drawings at least in part because of a quantity change associated with variation in the river bottom.

2. Recovery for Subsurface Conditions is Barred by the Construction Contract

I am certain you will agree that the City of Fort Wayne should not pay any additional compensation to the Contractor

on account of the alleged subsurface condition associated with the river bottom elevation unless it is legally obligated to do so under the terms of the contract for the project. In this regard, it is well established that a contractor's legal entitlement to recover for unforeseen or changed site conditions is dependent upon the existence of a so-called "differing site conditions" clause in his contract. In the absence of such a clause, a Contractor is considered to have assumed the risk of unforeseen subsurface conditions and is presumed to have accounted for such risks in his bid price by including contingency allowances to cover the possibility that changed subsurface conditions will be encountered. This is especially true in a situation such as this where a contract is based upon unit prices. There is no differing site conditions clause in the construction contract between the City and the Contractor for this project.

Most importantly, the contract in question expressly places the risk of subsurface conditions on the Contractor. Paragraph 16 at page I-8 states in pertinent part:

"The bidders shall be responsible for all conditions that effect the work including but not limited to all sub-surface conditions."
(emphasis added-see Attachment "B")

This clause could not be more explicit in preventing the Contractor from seeking and obtaining additional compensation associated with the river bottom elevation since it establishes that the Contractor contractually waived his right to do so. The disclaimer clause also establishes that the Contractor had no right to rely upon information concerning the river bottom as shown on the drawings.

It is difficult to understand why the City of Fort Wayne would gratuitously engage itself, by Change Order, to the payment of any amount of additional compensation when the underlying contract categorically protects against it having to do so. In any event, and without regard to the ultimate question of liability, the City is not entitled to recover such voluntary payments from Bonar.

3. Change Order Evaluation

As you know, Bonar appeared before the Fort Wayne City Council on March 1st and expressed reservations concerning the manner in which the City reviewed the Contractor's "changed conditions" claim and the substantiation provided to and used by City representatives in reaching tentative agreement for the additional compensation provided by the Change Order.

At the request of the City Council, Bonar has reviewed the documentation connected with the Contractor's claim and the Change Order as furnished to Bonar on or about March 7th. Bonar has since confirmed with Board of Works representatives that this packet of documentation represents all of the supporting information for the Change Order. From this review, it is clear that City representatives repeatedly asked the Contractor to supply sufficient documentation to support his claim. It is equally clear that the Contractor never supplied such verification. Instead, it appears that the Contractor's claim was received and accepted by the City at face value. The following is a listing of some of the shortcomings of the City's review and negotiation of the claim.

- (1) The Change Order allows compensation for two days of "down time", without any justification being provided to establish such recovery. In fact, it is noted that the Contractor never claimed compensation attributable to "down time".
- (2) No accurate survey or other determination has been made concerning the actual river bottom elevation encountered prior to the time that conditions were disturbed by the Contractor in the course of constructing the cofferdam. In correspondence dated August 27, 1987, the Contractor stated that the actual river bottom elevation was found to be approximately 737 feet, or 8 feet lower than a 745 foot elevation alleged by the Contractor to be shown on the plans. Presumably, the Contractor's claim was based upon this assumed 8 foot elevation differential; and yet, the Change Order addresses (without backup) an elevation difference of 5½ feet. Actual probings conducted after the condition was made known to Bonar indicate a differential of about 4 feet. No attempt appears to have been made to resolve these discrepancies or establish the true elevation differential and no attempt was made to adjust the claim accordingly.
- (3) No attempt has been made to reconcile the difference in sheeting prices which the Contractor has quoted in relation to the project. For instance, in March 1987, before construction commenced, the Contractor verbally advised that use of sheeting would involve an additional cost of approximately \$40,000.00. In the August 27, 1987 letter, the Contractor stated that costs to drive and pull sheeting were \$71,250.00 (with no backup); then, in the Contractor's correspondence dated November 30 and December 18, 1987, sheeting costs were stated in excess of \$99,000.00.

- (4) Payroll summaries submitted by the Contractor to support its claim (for example, see Attachment "C") do not differentiate between man hours associated with sheeting versus time spent on other base contract work. Furthermore, hourly wage rates are not provided or substantiated to justify the hourly rates claimed. When compared against the "prevailing wage rates" stated in the contract documents, the wage rates claimed by the Contractor appear exorbitant. For example, both the claim and the Change Order are based upon wage rates of \$21.72 per hour for laborers and \$25.80 for operators while prevailing wage rates for these classifications are \$13.67 (laborer) and \$16.70 (operator). Obviously, the personnel who reviewed the Contractor's claim negotiated the Change Order without any attempt to require probative justification from the Contractor.
- (5) The Change Order is based partly on 1,040 cubic yards of additional cofferdam materials with no indication as to how this overrun was surveyed or otherwise quantified or calculated. There is also an absence of documentation to establish the accuracy and reasonableness of the unit price allotted for this additional material. It is noted that the Contractor's claim referred to additional cofferdam materials of approximately 6,000 cubic yards; and yet the Change Order provides the same compensation as claimed but based upon material overruns which are only one-sixth of those claimed.
- (6) The Change Order provides compensation for 11,040 SF sheeting but without indicating how this number was arrived at or calculated. It is noted that the maximum lineal feet of sheeting placed at any one time was approximately 54 linear feet. At a 22 foot excavation depth, this would equal 2,376 square feet of sheeting on hand at any one time. The Contractor's claim referred to 18,000 square feet of sheeting and yet the change order provided compensation as claimed, even though sheeting was determined to be only 61% of the amount claimed.
- (7) No substantiation exists concerning the so-called "rental" charges included in the Contractor's claim for sheeting and crane use. If such equipment is owned by the Contractor, then rental rates are not legitimate for purposes of pricing the claim.

- (8) No investigation or analysis seems to have been undertaken concerning a credit to be taken on account of excavation or other work originally contemplated and made unnecessary by virtue of changed methods in construction relating to sheeting.
- (9) No evaluation seems to have been undertaken concerning the level or percentage of overhead and profit built into the claim or to substantiate the reasonableness of those figures.
- (10) There appears to have been no review of the Contractor's original bid takeoff and estimating work papers in order to determine how he originally estimated his costs, how he planned to perform his work, and any contingencies or allowances built into his pricing. This data should have been compared against confirmed actual costs incurred by the Contractor to perform the work.
- (11) Although the Change Order itself was signed on January 19, 1988, the City's review analyses of the claim were apparently concluded as early as December 22, 1987, when a one-page "Change Order Justification" was proposed (Attachment "D"). It is noted that the Contractor's additional "breakdown" of the claim was furnished by correspondence dated December 18, 1987 (shown as "Received" by the City on December 17, 1987). Thus, a time span of four days (including a two-day weekend) elapsed between receipt of the claim breakdown and final "justification" of the claim. It would have been virtually impossible for the City to conduct a meaningful analysis and negotiation of the claim in such a short time period.

It is our understanding that the City Council deferred action on the Change Order until Tuesday, March 22, to enable Bonar to submit its review comments as requested. Until the Change Order is approved it should not be binding upon the City of Fort Wayne and therefore, an opportunity still exists for the City to rectify the situation. Because of the serious deficiencies which underlie the Change Order, and the existing legal issue of whether any change order is appropriate, it is respectfully suggested that the Board of Works may wish to reconsider its position and recommendations concerning whether or not the Change Order should be consummated. On the other hand, if it appears likely that the Change Order will be voted on and approved by the City Council at its upcoming meeting, it will be necessary for us to furnish

Council members with copies of this letter as a means of honoring the Council's prior request for Bonar's review comments.

4. Other Issues

In response to some of the other matters raised in your March 2nd letter to Bonar, we offer the following:

- (1) The agreement entered into between Bonar and the Board of Works dated December 30, 1987, represented a good faith attempt on the part of both parties to narrow and define the issues concerning liability and damages and, as such, we consider that agreement to be fully enforceable until affirmative evidence is furnished to establish that the agreement as executed is invalid. Furthermore, regardless of its enforceability as a contract, the agreement constitutes admissible evidence of the intention and declarations of the persons signatory thereto concerning the measurement of damages in the event that Bonar is adjudged liable on the City's claim.
- (2) The City's recently-advanced argument that it would have relocated the project site if it had been aware of the actual river bottom elevation is unsupportable given the facts surrounding the design and construction of the project to an extent that would not be tolerable by City officials. The City was under stringent deadlines governing the construction and design of the project and in seeking and obtaining approval for the crossing from other governmental agencies. A relocation would have significantly jeopardized and delayed the project. The December 30th agreement between Bonar and the City contradicts any notion that the City would have relocated the site. No reference is contained in that agreement as to an option to relocate. Moreover, a full and fair reading of the document indicates quite the contrary. Additionally, the City had the opportunity to decide to relocate the project in August 1987, when the variance in river bottom elevation was first discovered. Even though some of the work had already been performed by the Contractor, most of the work remained to be done and therefore the project could have been temporarily suspended and work could have been stopped at the crossing location and a change order issued to relocate the site, resulting in considerably less additional cost to the City than is now contemplated by way of the pending Change Order.

Mr. R. David Boyer
March 21, 1988
Page Eight

We look forward to the opportunity of discussing the above issues openly with yourself and other members of the Board of Works. Obviously, because of the time pressures associated with the question of City Council approval of the Change Order, some strategic decisions must be made rather quickly by the Board. In other respects, it is hoped that circumstances will permit all concerned to work together in a mutual and productive fashion toward an appropriate resolution of this unfortunate circumstance.

Sincerely,

LOWE GRAY STEELE & HOFFMAN

A handwritten signature in dark ink, appearing to read "R. J. Hoffman", is written over the typed name. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Robert J. Hoffman

RJH/ed

Attachments

SECTION 2—ADDITIONAL SERVICES OF ENGINEER

2.1. General

If authorized in writing by OWNER, ENGINEER shall furnish or obtain from others Additional Services of the following types which are not considered normal or customary Basic Services except to the extent provided otherwise in Exhibit A "Further Description of Basic Engineering Services and Related Matters"; these will be paid for by OWNER as indicated in Section 5.

* * *

2.1.7. Furnishing the services of special consultants for other than the normal civil, structural, mechanical and electrical engineering and normal architectural design incidental thereto, such as consultants for interior design, furniture, furnishings, communications, acoustics, kitchens and landscaping; and providing data or services of the types described in paragraph 3.3 when OWNER authorizes ENGINEER to provide such data or services in lieu of furnishing the same in accordance with paragraph 3.3.

* * *

SECTION 3—OWNER'S RESPONSIBILITIES

OWNER shall:

* * *

3.3. Furnish to ENGINEER, as required for performance of ENGINEER's Basic Services (except to the extent provided otherwise in Exhibit A "Further Description of Basic Engineering Services and Related Matters"), data prepared by or services of others, including without limitation core borings, probings and subsurface explorations, hydrographic surveys, laboratory tests and inspections of samples, materials and equipment; appropriate professional interpretations of all of the foregoing; environmental assessment and impact statements; property, boundary, easement, right-of-way, topographic and utility surveys; property descriptions; zoning, deed and other land use restriction; and other special data or consultations not covered in Section 2; all of which ENGINEER may rely upon in performing his services.

ATTACHMENT "A"

2. My Company has taken the following steps in an attempt to comply with the 17 1/2 hourly utilization figure:

(attach additional sheets if necessary)

Contractor JOHN DEHNER, INC.

By

Gregory Dehner

Gregory Dehner
Vice-President

Its _____

15. Required Prevailing Wage Schedule Payments - Pursuant to Indiana Code 5-16-7-1. All contractors and subcontractors working on the project awarded pursuant to this contract shall pay the prevailing wage rates for skilled, semi-skilled and unskilled laborers, workmen and mechanics. This wage determination has been made in accordance with the procedures set forth in Indiana Code 5-16-7-1. This determination and the required wage rates are available for examination by any prospective bidder at The Board of Public Works and Safety, 9th Floor, City-County Building, Fort Wayne, Indiana.

If a bidder is awarded a contract as a result of this Invitation for Bids, he/she/it shall file a schedule of wages, on forms provided by the City of Fort Wayne, demonstrating compliance with the wage rate determination. The successful prime contractor shall be responsible for obtaining schedules from all subcontractors. All schedules shall be filed before the contractor commences any work on the project.

Penalties for failure to pay the prevailing wage rate are set forth in Indiana Code 5-16-7-3.

16. Site Orientation. A site orientation (will/will not) be conducted by the City Engineers. If such an orientation is conducted, it will be held on the _____ day of _____, 19____, commencing at _____ o'clock ____ M. at the site of the project.

Regardless of whether a site orientation is conducted or not, bidders are required to visit the site of the work, and inform themselves fully of the conditions, under which the work will be performed. The bidders shall be responsible for all conditions that affect the work, including, but not limited to all sub-surface conditions.

FORT WAYNE, IND.

DIVISION

WEEK ENDING

OF

ATTACHMENT "C"

Change Order Justification
Fairfield Sanitary Sewer Res #440-26

(27) Additional Cofferdam Material Required
= 1040 cu. @ 9.⁹²/cu = 10,368.⁹²

(28) Sheeting Required due to additional depth
= 11,040 s.f @ 7.⁷⁴/s.f. = 85,479.⁷⁴

- Downtime due to discrepancy in plans.

(26) (a) laborers 2 days 8 Hrs./day @ 21.³²/Hr = 2035.³²
(2) Operators 2 days 8 Hrs./day @ 25.⁸⁰/Hr = 825.⁸⁰
(1) Foreman 2 days 8 Hrs./day @ 38.⁰⁰/Hr = 608.⁰⁰
3,518.¹²

Total Cost For
Additional Work = 99,337.¹²

add 12/22/87